IN THE

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

THE NAVAJO TRIBE, a Treaty Tribe of Indians, *et al.*,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, TEXAS-ZINC MINERALS CORPORATION, INTERNATIONAL HOD CARRIERS', BUILDING AND COMMON LABORERS' UNION OF AMERICA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. A1-A7) has not yet been reported. The decision of the National Labor Relations Board (JA 37-46) is reported at 126 N.L.R.B. 603.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. A8) was entered on March 2, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, in view of the Treaty of 1868 with the Navajo Indian Tribe and that Tribe's recognized powers of self-government, the Labor Management Relations Act, 1947, as amended, authorizes the National Labor Relations Board to direct a representation election among the employees of a corporate lessee of the Navajo Indian Tribe, which, with the permission and consent of the Tribe, is doing business upon and within the Navajo Indian Reservation.

CONSTITUTIONAL PROVISION, TREATY, AND STATUTE INVOLVED

The Commerce Clause and the pertinent provisions of the Treaty of 1868 with the Navajo Indian Tribe and of the Labor Management Relations Act, 1947, as amended, are set forth in Appendix C, *infra*, pp. A9-A12.

STATEMENT

The Advisory Committee of the Navajo Tribe in 1958 studied the problem of labor relations on the Navajo Indian Reservation (JA 80-95), and found that, with minor exceptions, the individual members of the Tribe were illiterate, poorly educated, unable to speak or understand English with facility, and did not share American or European cultural traditions. On the basis of those facts, the Advisory Committee concluded (JA 91-92) that the members of the Navajo Tribe who constituted the working force on the Reservation, were incapable of determining for themselves—

"(a) The advantages and disadvantages of unionization.

"(b) The advantages and disadvantages of membership in a union.

"(c) How to vote upon, manage or regulate the ordinary business of a union.

"(d) Whether a particular contract, negotiated by the officers of a union or by a negotiating committee is a fair, reasonable and proper contract made with due regard to the welfare of the union or of the individual membership therein."

Acting on the Advisory Committee's report, the Navajo Tribal Council—the Tribe's governing body (JA 9-10)—adopted three resolutions on August 27, 1958.

The first of these (JA 20-22), adopted by a vote of 65 to 0, directed the preparation of a vocational training program and plans, and declared it to be

> "the policy of the Navajo Tribe to cooperate and collaborate with any unions desiring to participate, in similar training programs which they may maintain to the end that the classification of Navajo workers in a representative number of skills, crafts and trades becomes a reality before they become members of a union rather than to have them join unions first as common laborers and thereafter attempt to improve their classifications within the framework of the unions."

The second resolution (JA 22-23), adopted by a vote of 67 to 0, declared that

> "Permission and authority to solicit for memberships in or to conduct any other incidents or adjuncts of unionization activities on the Navajo Reservation or within the territory under the jurisdiction of this Council are denied and refused."

The final resolution (JA 24-28), adopted by a vote of 62 to 0 with 2 abstentions, established a Tribal

Labor Policy that discouraged unionization in numerous particulars, viz.: prohibition against solicitation for memberships in or conducting any other incident or adjunct of unionization activities in the Navajo country; a "right to work" declaration; prohibition of threatened or actual interference with a person, his family or property, to coerce him to join or withdraw from a labor organization, to strike, or to leave employment; prohibition of illegal strikes and lockouts; and prohibition of compulsory payment of dues to labor organizations as a condition of employment or continuation of employment. Future agreements involving violation of the resolution were declared to be illegal (Secs. 4, 8; JA 25-26, 27), and provision was made for injunctive relief and damages in the event of violations (Sec. 7, JA 26-27). Obedience to the resolution was required as a condition of all future mineral leases, with provision for forfeiture in the event of breach (Sec. 12, JA 28). The following penalties were provided (Sec. 11, JA 28):

Any Indian violator was to be subject, upon conviction, "to labor for a period of not to exceed 30 days," any non-Indian violator to exclusion from Navajo Tribal land in accordance with existing procedures.

Earlier, on July 25, 1956, the Navajo Tribe had leased to Texas-Zinc Minerals Corporation (hereinafter "Texas-Zinc") for 25 years a tract of land within the Reservation at Mexican Hat, San Juan County, Utah (JA 32-36), on which that company now operates a uranium concentrate mill, from which it annually ships materials in excess of $5,000,000 in value to the Atomic Energy Commission's receiving station in Colorado. About 87 persons, of whom 47 are members of the Navajo Tribe and 40 are non-Indians, are employed at the mill. (Fdg. 1, JA 108.)

On May 12, 1959, the United Steelworkers of America, AFL-CIO (hereinafter "Steelworkers") filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act (29 U.S.C. § 159(c)) requesting that an election be held to determine whether Texas-Zinc's employees wished to be represented by it for collective bargaining purposes. (Fdg. 2, JA 108.)

At the representation hearing before the Board, the Navajo Tribe intervened specially for the purpose of contesting the Board's jurisdiction in the proceeding. Texas-Zinc, the Steelworkers, and two other intervening unions—International Hod Carriers', Building and Common Laborers' Union of America, and International Union of Operating Engineers, AFL-CIO—participated in the hearing. (Fdg. 3, JA 108-109.)

On February 11, 1960, the Board by a vote of 3-2 issued its Decision and Direction of Election, in which it determined that it had jurisdiction to administer the provisions of the National Labor Relations Act in respect of interstate businesses located on the Navajo Indian Reservation, and directed that a representation election be held as requested by the Steelworkers' petition (JA 37-46; 126 N.L.R.B. 603; Fdg. 4, JA 109). Two Members of the Board dissented "because in our view the National Labor Relations Board does not have jurisdiction over the Employer in this case" (JA 46).

Thereupon, on March 23, 1960, the Navajo Tribe brought the present action to enjoin the Board from conducting a representation hearing (JA 3-28), joining as defendants the Members of the Board and the three interested unions.

The gravamen of the complaint was that the Board lacked jurisdiction because the Navajo Tribe has plenary authority with respect to the members of its Tribe and as to all activity conducted on the reservation, except to the extent that such authority has been expressly limited by the United States; that pursuant to its powers of self-government, the Tribe through its governing body, the Tribal Council, has enacted resolutions forbidding all unionization activities on its reservation; that the National Labor Relations Act was not intended to apply to business activities carried on within the boundaries of an Indian reservation; and that the power to exclude union solicitors derives from so much of Article II of the Treaty of 1868 with the Tribe as provides (15 Stat. 667 at 668) that

> "* * * the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."

Texas-Zinc, the employer, was on motion permitted to intervene (JA 29-30, 99); its complaint sought an injunction against the holding of the election until determination of the present case (JA 99-103).

The Board and all three unions filed motions to dismiss and or for summary judgment (JA 31-74, 75-80, 95-98, 103-104), after which those motions, together with the Tribe's motion for a preliminary injunction, came on for hearing (Fdg. 8, JA 110).

The District Court (Youngdahl, D. J.) held that the operations of Texas-Zinc affected interstate commerce within the meaning of the National Labor Relations Act, and that the Board was accordingly authorized to entertain the complaint for a representation election among the employees of Texas-Zinc (Conc. 1, 2, JA 110). Accordingly, on the footing that the Navajo Tribe and the intervenor failed to state claims warranting relief, the District Court dismissed their complaints (JA 111).

On appeal (JA 111-112), the court below affirmed. Reading the Act literally, the District of Columbia Circuit held that it applied to Texas-Zinc because that company was engaged in the production of goods for interstate commerce, and that the Congressional labor policy embraced in the Act superseded the local labor policy of States and Indian tribes.

REASONS FOR GRANTING THE WRIT

Here, as in other recent cases (*Squire* v. *Capoeman*, 351 U.S. 1; *Williams* v. *Lee*, 358 U.S. 217; *Federal Power Comm.* v. *Tuscarora Indian Nation*, 362 U.S. 99), there is presented a substantial and significant question involving the impact of State or Federal legislation upon the quasi-sovereignty of Indian tribes, in this instance the most numerous of any in the United States, having some 85,000 members, and living on a Reservation that is as large as the entire State of West Virginia.

The record establishes that the overwhelming number of Navajos are illiterate, poorly educated, unable to speak or understand English with facility, and hence incapable of determining for themselves the advantages and disadvantages of unionization, how to vote

upon or manage the ordinary business of a union, or whether a particular union contract duly negotiated is fair, reasonable, or proper. The question is whether Congress intended, or could have intended, to subject such an Indian tribe to the bombardment of union importunities that are a necessary and recognized accompaniment of the labor movement under the National Labor Relations Act and successor legislation.

We submit that the decision below, which answers that question in the affirmative, disregards hitherto settled standards for the interpretation of legislation affecting Indians, and that the court below accordingly has violated the Navajo Tribe's solemn compact with the United States.

First. The court below held (*infra*, page A6) that "the Act clearly applies to the Texas-Zinc Minerals Corporation, the employer-intervenor, because it is engaged in the production of goods for interstate commerce, and labor disputes in its plant would clearly 'affect commerce' within the meaning of the Act." Therefore, said the court below, the circumstance that the employer's plant is located on the reservation cannot remove it or its employees, Indians or otherwise, from the coverage of the Act; and the Congressional labor policy supersedes local policies of the States and the Indian Tribes in all cases to which the Act applies.

We submit that the Court of Appeals' literal reading of the National Labor Relations Act not only is not decisive of the real issue here but actually obscures it.

Starting with that reading, it is at once apparent that the Act is in conflict, not so much with the Navajo Tribe's labor policy as such, as with the Tribe's leg-

islative exclusion of union solicitors (JA 23; 24-25), enactments that are squarely bottomed on its Treaty of 1868 with the United States. If the Labor Act applies, then the Treaty has been unilaterally modified by Congress, in derogation of the Indians' earlier rights, for the Tribe would then be limited in its right to exclude outsiders. Contrariwise, if the Treaty prevails according to its terms, then the Tribe's power to exclude union solicitors is absolute, and, since solicitation of union membership is obviously protected under the Act, it follows that the Act must be inapplicable within the Reservation.

Second. The resolution of that conflict between the Treaty and the Act involves, not any question of power, because Congress has undoubted *power* to annul or abrogate or modify Indian treaties and to turn them into "white men's promises" (e.g., *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553), but one of construction. Petitioners submit that, under two hitherto settled rules, the conclusion properly to be reached is that the Treaty prevails.

(1) "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Elk* v. *Wilkins*, 112 U.S. 94, 99-100, and cases there cited. And, as *Squire* v. *Capoeman*, 351 U.S. 1, teaches, this rule is particularly applicable whenever there is apparent conflict between the broad terms of a general statute and the specific provisions of an Indian treaty.

(2) Indian treaties are never to be construed to the prejudice of Indians; rather, "enlarged rules of construction are adopted" (*The Kansas Indians*, 5 Wall. 737, 760), "in a spirit which generously recognizes the

full obligation of this nation to protect the interests of a dependent people" (*Tulee* v. *Washington*, 315 U.S. 681, 684-685), and "in the sense in which they would naturally be understood by the Indians" (*Jones* v. *Meehan*, 175 U.S. 1, 11). This principle, this approach, this standard of textual interpretation, has been repeated and reiterated in many differing contexts, particularly in recent years. *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116, 117; *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297; *Squire* v. *Capoeman*, 351 U.S. 1, 6-7.

Since, in the present case, Congress plainly did not have Indian treaty rights in contemplation, either when it enacted the National Labor Relations Act in 1935 or when it passed the Labor Management Relations Act in 1947; since the exercise of the rights under those measures is necessarily in conflict with the Navajo Tribe's right to exclude outsiders under its Treaty of 1868 with the United States; we submit it follows that, under the rules of construction just set out, the Tribe's treaty rights must prevail.

Third. The foregoing analysis is not contrary to the holding in *Federal Power Comm.* v. *Tuscarora Indian Nation*, 362 U.S. 99. There Congress not only had Indians in contemplation—indeed, the case turned on the meaning of "Indian reservations" in Sec. 3(2) of the Federal Power Act, 16 U.S.C. § 796(2)—but the Court specifically held that that Act as interpreted did not violate any treaty. See 362 U.S. at 124.

Similarly, *Superintendent* v. *Commissioner*, 295 U.S. 418, does not foreclose the Navajo Tribe here, for at least two reasons. First, in that case only the taxation of individual Indians was involved, whereas here it is the very sovereignty of the Navajo Tribe and the terms

of the Treaty of 1868 that stand to be impaired. Second, *Superintendent* v. *Commissioner* hardly supports the proposition that all general statutes invariably include and are applicable to Indians, as indeed *Squire* v. *Capoeman*, 351 U.S. 1, with its holding that interest from the sale of timber on allotted land was not subject to the capital gains tax, dramatically demonstrates. See also *Landman* v. *United States*, 109 C. Cls. 1, certiorari denied, 332 U.S. 815, holding that a restricted Indian's allotment could not be included in his gross estate for purposes of the Federal estate tax.

Fourth. Only a little more than two years ago, this Court said of the Navajos' Treaty with the United States (*Williams* v. *Lee*, 358 U.S. 217, 221-222, 223):

> "Implicit in these treaty terms * * * was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.
>
> * * * * *
>
> "The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it."

We submit that the holding below, to the effect that the general terms of a labor management enactment are to be construed to curtail the Navajos' treaty rights to exclude outsiders from their Reservation, so far runs counter to hitherto settled doctrines, and so seriously threatens to disrupt the tribal life of an untutored and dependent people as yet unprepared to cope with the incidents of industralization, as to require review—and rectification—by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APRIL 1961.

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,735

THE NAVAJO TRIBE, a Treaty Tribe of Indians, *et al.*, *Appellants*

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*, *Appellees*

Appeal from the United States District Court for the District of Columbia

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Decided March 2, 1961

Mr. Joseph F. McPherson, with whom *Messrs. Norman M. Littell* and *Charles J. Alexander* were on the brief, for appellants.

Mr. Durane B. Beeson, Attorney, National Labor Relations Board, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of court, with whom *Messrs. Stuart Rothman*, General Counsel, National Labor Relations Board, *Dominick L. Manoli*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Herman M. Levy*, Attorney, National Labor Relations Board, were on the brief, for appellee National Labor Relations Board. *Mr. Russell Specter*, Attorney, National Labor Relations Board, also entered an appearance for appellee National Labor Relations Board.

Mr. Joseph M. Stone, with whom *Mr. Robert J. Connerton* was on the brief, for appellee International Hod Car-

riers', Building and Common Laborers' Union of America, AFL-CIO.

Mr. David E. Feller, with whom *Mr. Jerry D. Anker*, was on the brief, for appellee United Steelworkers of America.

Messrs. J. Albert Woll, Robert C. Mayer, and *Theodore J. St. Antoine* were on the brief for appellee International Union of Operating Engineers, AFL-CIO.

Mr. Alfred A. Colby entered an appearance for appellee Texas-Zinc Minerals Corp.

Before MAGRUDER, Senior United States Circuit Judge for the First Circuit,* and PRETTYMAN and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge*: This case presents the question whether the Navajo Tribe of Indians is entitled to an injunction preventing the National Labor Relations Board from holding a representation election in a mining plant located on the Navajo Reservation. Suit seeking that relief was brought in the District Court by the Tribe and one of its members against the Labor Board, its members, and three interested unions. The corporation owning the plant intervened as a party plaintiff. Plaintiffs moved for a preliminary injunction; defendants moved for dismissal of the complaint. The court granted the defendants' motion and denied that of the plaintiffs. This appeal followed.

The District Court's principal findings of fact are as follows:

> "1. Plaintiff-intervenor Texas-Zinc Minerals Corporation operate a uranium concentrate mill at Mexican Hat, Utah within the Navajo reservation and annu-

*Sitting by designation pursuant to Sec. 294(d), Title 28, U. S. Code.

ally ships materials in excess of $5,000,000 in value from the Company's plant to the Atomic Energy Commission's receiving station in Colorado. This Company is party to a twenty-five year lease with plaintiff Navajo Tribe covering the land on which the mill is located, which lease was executed in 1956. About 87 persons, of whom 47 are members of the Navajo Tribe and 40 are non-Indians, are employed at the mill.

"2. On May 12, 1959, the United Steelworkers of America, AFL-CIO filed a petition with the Board under Section 9(c) of the National Labor Relations Act requesting that an election be held to determine whether the Texas-Zinc Minerals Corporation's employees wished to be represented by it for collective bargaining purposes.

"3. At the representation hearing before the Board, the Navajo Tribe intervened specially for the purpose of contesting the Board's jurisdiction in the proceeding. The Company, the Steelworkers, and two other unions which intervened in the case, International Union of Operating Engineers, AFL-CIO and International Hodcarriers, Building and Common Laborers Union of America, participated at the hearing.

"4. On February 11, 1960, the Board issued its Decision and Direction of Election in which it determined that the Board has jurisdiction under the Act to administer its provisions with respect to interstate businesses located on the Navajo reservation, and particularly that the Board had such jurisdiction in the case before it, and directed that a representation election be held as requested by the Steelworkers' petition.

"5. On March 23, 1960, plaintiff instituted the instant suit for the purpose of enjoining the Board

from conducting a representation hearing. The gravamen of the complaint is that the Board lacks jurisdiction to conduct an election because (1) the Navajo Tribe has plenary authority of self-government with respect to the members of its Tribe and as to all activity conducted upon its reservation, except to the extent that the federal government has expressly limited such authority, and that pursuant to its power of self-government the Tribe has enacted resolutions forbidding all unionization activities on its reservation, and (2) the National Labor Relations Act was not intended to apply to commerce with an Indian Tribe or to interstate commerce resulting from business activities located on an Indian reservation, nor did Congress exercise its constitutional power in the National Labor Relations Act to regulate commerce 'with the Indian Tribes.'

"Following the filing of the complaint Texas-Zinc Minerals Corporation filed a motion to intervene as plaintiff, and attached thereto its proposed complaint in which it requested, in its prayer for relief, only that the representation election be enjoined until final judicial determination of the issues raised by the pleadings in the proceeding before this Court."

The District Court also stated the following conclusions of law:

"1. The operations of Texas-Zinc Minerals Corporation's plant located on the Navajo Tribe's reservation, as described in the complaint herein, affect interstate commerce within the meaning of the National Labor Relations Act.

"2. The provisions of the National Labor Relations Act, including *inter alia* the provisions which authorize the Board to conduct representation proceedings, are applicable to the Texas-Zinc Minerals Corporation

plant involved in this case, and the Board is accordingly authorized to entertain the petition described in the complaint herein for a representation election among the employees of such plant.

"3. The complaints of plaintiffs Navajo's Tribe and intervenor Texas-Zinc Minerals Corporation fail to state claims warranting relief."

The quoted findings of fact by the District Court are not substantially questioned by appellants. The conclusions of law, however, are vigorously assailed. Appellants' central contentions are that under the Treaty of June 1, 1868, 15 STAT. 667, between the Navajo Tribe and the United States, the Tribe has broad powers of self government, including the right to exclude outsiders;[1] that the decision of the Tribal Council to prevent union activity on its Reservation was within its authority; and that the National Labor Relations Act should not be construed in a way which would conflict with the Treaty and the Tribe's rights under it.

Forceful as these contentions are, we are constrained to disagree. When the Treaty of 1868 was adopted, tribal

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[1] The Treaty provision mainly relied on by appellants is the following:

"The United States agrees that . . . [the Reservation] . . . shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." 15 STAT. 668.

control of such labor problems as may then have existed on the Tribal Reservation may well have been expected, at least to the exclusion of interference by the several States.[2] Since then, however, Congress has adopted a national labor policy, superseding the local policies of the States and the Indian tribes, in all cases to which the National Labor Relations Act applies. Here, the Act clearly applies to the Texas-Zinc Minerals Corporation, the employer-intervenor, because it is engaged in the production of goods for interstate commerce, and labor disputes in its plant would clearly "affect commerce" within the meaning of the Act.[3] The circumstance that the Corporation's plant is located on the Navajo Reservation cannot remove it or its employees—be they Indians or not—from the coverage of the Act. Compare *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641, 656 (1890); *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960).[4]

The Tribe says that Congress in the National Labor Relations Act did not rely on, or purport to exercise, its power to regulate commerce "with the Indian Tribes," Constitution, Article I, Section 8, Clause 3, and that hence such commerce remains unregulated by the Act. But it is doubtful that commerce with an Indian tribe is involved

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[2] *Compare* Worcester v. Georgia, 6 Pet. (31 U.S.) 515 (1832); Williams v. Lee, 358 U.S. 217 (1959).

[3] The Tribe contests this, but we think it is plainly mistaken, in view of Finding of Fact No. 1, quoted above, not here disputed. See Sections 9(c), 2(6) and 2(7) of the Act.

[4] The decision in Elk v. Wilkins, 112 U.S. 94 (1884), whatever its present-day significance, certainly does not operate to remove "Indians and their property interests" from the coverage of a general statute. See Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. at 116. The National Labor Relations Act is a general statute. Its jurisdictional provisions, and its definitions of "employer," "employ ," and "commerce" are of broad and comprehensive scope.

in this case at all.[5] The Board regulates labor disputes affecting interstate commerce, and the Act authorizes it to do so without stating any exception which would preclude its acting with respect to a plant located within an Indian reservation, or one employing Indians. Congress need not cite or purport to rely on all its powers, when reliance on a single power is ample to sustain its mandate. Nor is its failure to mention its power over commerce with the Indian tribes any indication that it intended to narrow its action with respect to interstate commerce in the manner suggested by appellants.

We conclude that the Board had jurisdiction to enter its challenged order, directing an election. Questions as to the wisdom of the Board in entering the order are not for the courts to decide, and we express no opinion about them. The judgment of the District Court[6] will be

Affirmed.

[5] *Compare* United States v. Forty-Three Gallons of Whiskey, 3 Otto (93 U.S.) 188 (1876); United States v. Holliday, 3 Wall. (70 U.S.) 407 (1865); *Ex parte* Webb, 225 U.S. 663 (1912).

[6] No party to this appeal contends that the District Court lacked jurisdiction over the litigation. Since the suit was one which challenged the Board's determination as being in excess of the Board's powers, and a justiciable question of statutory construction was raised, jurisdiction clearly existed. See Leedom v. Kyne, 358 U.S. 184 (1958).

APPENDIX B

JUDGMENT BELOW

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

Civil 867-60

No. 15,735

THE NAVAJO TRIBE, a Treaty Tribe of Indians, *et al.*, *Appellants*,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*, *Appellees*.

Appeal from the United States District Court
for the District of Columbia

Before: Magruder, Senior United States Circuit Judge for the First Circuit, and Prettyman and Washington, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the court that appellees, except the National Labor Relations Board, recover from appellants their taxable costs on this appeal, and have execution therefor.

PER CIRCUIT JUDGE WASHINGTON.

Dated: Mar. 2, 1961.

APPENDIX C

CONSTITUTIONAL PROVISION, TREATY, AND STATUTE INVOLVED

1. The Constitution of the United States provides in Art. I, Sec. 8, Cl. 3, as follows:

> "The Congress shall have Power * * *
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *"

2. Article II of the Treaty of 1868 between the United States and the Navajo Indian Tribe (15 Stat. 667, 668), provides in pertinent part that:

> "* * * the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."

3. The relevant provisions of the Labor Management Relations Act, 1947, as amended (29 U.S.C. §§ 151 *et seq.*), are as follows:

> "DEFINITIONS
>
> "SEC. 2. * * *
>
> "(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.
>
> "(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly

owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any

other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"REPRESENTATIVES AND ELECTIONS

* * * * *

"SEC. 9. (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufactur-

ing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * * *

"SEC. 14.

* * * * *

(c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

No. 872

Supreme Court of the United States

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE HOD CARRIERS AND OPERATING ENGINEERS UNIONS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

THE NAVAJO TRIBE, A TREATY TRIBE OF INDIANS, *et. al.*, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, INTERNATIONAL HOD CARRIERS', BUILDING & COMMON LABORERS' UNION OF AMERICA, AFL-CIO, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, *et. al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE HOD CARRIERS AND OPERATING ENGINEERS UNIONS IN OPPOSITION

OPINIONS BELOW

The opinion of the National Labor Relations Board is reported at 126 N.L.R.B. 603. The opinions of the District Court and of the Court of Appeals are not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the Labor Management Relations Act, 1947, as amended, is rendered inapplicable to an interstate non-Indian business because it happens to be located on an Indian Reservation?

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act, 1947, as amended, are set forth in Appendix C, pp. A-9-12 of the Petition.

STATEMENT

In view of the Statement set forth in the brief in opposition submitted by the National Labor Relations Board, no useful purpose would be served by including a similar statement herein and, accordingly, we adopt and incorporate by reference the statement contained in the Board's brief.

ARGUMENT

Stated succinctly and bluntly, we do not believe that employees of a large interstate non-Indian business are not entitled to the benefits and protections of national labor relations laws simply because their employer has an Indian Tribe for its landlord. Yet this is the view of the Navajo Tribe—a view which both the District Court and the Court of Appeals properly and summarily rejected.

In both lower courts, the Tribe had argued, in essence, that whenever Indians and their interests have been the subject affected by legislation, they have been named and their interests specifically dealt with, that Congress has power to regulate not only interstate and foreign commerce but also "commerce with the Indian tribes" and that the absence of any reference in the Labor Management Relations Act to commerce with Indian Tribes is a plain indication of Congress' intention to preclude the Act's application to Indians and their reservations. This is essentially the same kind of argument as was made by the Tuscarora Tribal Nation in *Federal Power Commission* v. *Tuscarora*, 362 U.S. 99, an argument which this Court rejected, stating that at least since *Chotegu* v. *Burnet*, 283 U.S. 691, "The intent to exclude must be definitely expressed, where . . . the language of the Act . . . is broad enough to include the subject matter" (283 U.S. at 696). We submit that the

decisions below are in accord with hitherto settled standards for the interpretation of legislation affecting Indians.

The petitioner now seeks review for the reasons "that the court below . . . has violated the Navajo Tribe's solemn compact with the United States" (Pet. p. 8); that "it is at once apparent that the Act is in conflict . . . with *the Tribe's legislative exclusion of union solicitors*" and "if the Treaty prevails . . : then *the Tribe's power to exclude union membership is absolute*, and, since solicitation of union membership is obviously protected under the Act, *it follows* that the Act must be inapplicable within the Reservation" (emphasis supplied) (Pet. pp. 8-9); that "the resolution of that conflict between the Treaty and the Act involves [a] question . . . of construction" (ibid); and that "since the exercise of the rights under [National Labor Relations Act and Labor Management Relations Act] is necessarily in conflict with the *Navajo Tribe's right to exclude outsiders* . . . it follows that . . . the Tribe's treaty rights must prevail" (emphasis supplied) (Pet. p. 10). Accordingly, the Petitioner "submit[s] that the holding below, to the effect that the general terms of a labor management enactment are to be construed to curtail the *Navajos' treaty rights to exclude outsiders* from their Reservation, so far runs counter to hitherto settled doctrines, and so seriously threatens to disrupt the tribal life of an untutored and dependent people as yet unprepared to cope with the incidents of industrialization as to require review . . . by this Court" (emphasis supplied) (Pet. p. 11).

The foregoing views of the Petitioner have been designedly set forth in some detail so that there can be no question as to the precise thrust of Petitioner's request for review, namely, the alleged conflict between the provisions of the Labor Management Relations Act and the Tribe's Treaty right to exclude outsiders from its Reservation. But that is not the issue *in this case*, even though it is conceivable that such an issue may directly arise under different circumstances in another case at another time.

Here, the sole issue is whether the Act is applicable to an interstate business on an Indian Reservation. Petitioner answers in the negative and argues that application of the Act necessarily conflicts with the Tribe's treaty right to exclude outsiders. No such conflict necessarily exists, as is plainly shown in the next paragraph, and, accordingly, since in deciding this case it is unnecessary for this Court to resolve such an alleged conflict, there is no sound basis for this Court's review for the reasons urged by Petitioner.

That the question of the Act's application is one that is completely separate and apart from the question of the scope of the Tribe's right to exclude outsiders is readily demonstrable. The question of the Act's application would obviously be the only question in issue in a case in which all of the employees and Union organizers involved were Indians residing on the Reservation; the complete absence of any outsider would clearly preclude consideration of the question of the Tribe's right to exclude. Thus, the applicability of the Act must be determined without reference to the Tribe's right to exclude for, plainly, if the Act is inapplicable then the right to exclude remains unaffected and if it is decided that the Act applies then it must apply wholly irrespective of the Tribe's right to exclude outsiders. Otherwise, we might have the absurd situation of applicability to an all-Indian situation but non-applicability where outsiders are involved.

With respect to the basic question of the applicability of the Act, apart from the alleged conflict with the right to exclude, the petition fails to demonstrate that the decision below is not in accord with decisions of this Court or is in conflict with decisions of other Circuit Courts of Appeals or, indeed, in what manner error has been committed. In the absence of such a showing, we submit that review is unwarranted.

Moreover, for reasons above stated, since the Tribe's right to exclude is not necessarily in issue here, review of this case would not determine the scope or application of such right. This case arose by virtue of the Tribe's chal-

lenge to the jurisdiction of the Board to hold an election. Such an election could be held without any party challenging the Tribe's right to exclude[1] Such a challenge, however, would directly raise the question for judicial determination for the first time and if that is the issue in which the Tribe is primarily interested the instant case is inappropriate for its resolution. Accordingly, no sound reason has been presented to impel this Court to grant the requested writ, and no purpose would be served in granting certiorari if the sole reason for review lies the Tribe's concern for its Treaty right to exclude outside

Apart from the legal arguments advanced in the petition, the petitioner apparently believes its position is somehow supported by an allegation that "illiterate, poorly educated" Navajo Indians are "incapable of determining for themselves the advantages and disadvantages of unionization, how to vote upon or manage the ordinary business of a union". (Pet. pp. 7-8) The record hardly establishes that this is the proper view of the Tribe's capacity for safeguarding its own interests. Such a view ignores "a quarter century of organizational activity on the [Navajo] Indian Reservation". (J.A. 98). As the record indicates, "since 1934 the International [Hod Carriers', Building and Common Laborers' Union of America] and its affiliates have been actively engaged in representing workers employed on and adjacent to the reservation, including thousands of Navajo Indians living on and off the reservation "and" at the present time the Union has as members, over 500 Navajos" (J.A. 97).

We submit that the decision below to the effect that the Labor Management Relations Act of 1947, as amended, is applicable to activities affecting interstate commerce whether such activities are on or off an Indian Reservation is correct in the absence of an express statutory exemption

[1] No question arises as to the right of Government personnel to enter the Reservation for the purpose of holding an election since under Article II of the Treaty "agents and employees of the government . . . [may] . . . enter upon Indian reservations in discharge of duties imposed by law" (Pet. App. C, p. A9).

for Indians or their Reservations and, accordingly, neither review or rectification is required by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

THE NAVAJO TRIBE, *et al.*

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

BRIEF FOR UNITED STEELWORKERS OF AMERICA IN OPPOSITION

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IN THE

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BRIEF FOR UNITED STEELWORKERS OF AMERICA IN OPPOSITION

Unless this Court wishes to review every case in which an Indian Tribe challenges the application to it of a basic federal statute, there is no ground for certiorari in this case.

There is only one issue raised in the Navajos' petition: whether the Texas-Zinc Minerals Corporation, which operates "a uranium concentrate mill at Mexican Hat, Utah, within the Navajo Reservation and annually ships materials in excess of $5,000,000 in value from the Company's plant to the Atomic Energy Commission's receiving station in Colorado" (J.A. 108) is exempt from the provisions of the National Labor Relations Act because the plant is located on the Reservation. There is no dispute that Congress has the power to make such legislation applicable on Indian reservations, notwithstanding any state law, tribal law, or treaty to the contrary. The Tribe's sole contention is that the Act, although in terms it applies to all industries which "affect commerce," was not intended to apply to any enterprise on an Indian Reservation.

In the lower courts, the Tribe based its entire argument on the fact that there is no language in the Act expressly making it applicable to "commerce with the Indian Tribes." This argument, of course, is plainly without merit, and appears now to have been abandoned by the Tribe. Even if the commerce in this case were to be considered "commerce with the Indian Tribes"—a matter which is itself dubious since the commerce involved is between the Texas-Zinc Corporation and the Atomic Energy Commission—this would not negate the fact that it is, or at least "affects," interstate commerce as well. And while everyone would agree that the failure to cover "commerce with the Indian Tribes" exempts such commerce from the coverage of the Act when it is purely intrastate and has no impact on interstate commerce, it surely does not follow that an activity which would otherwise be subject to the Act is not covered simply because it is engaged in by an Indian, or for some other reason constitutes "commerce with the Indian Tribes." [1]

In short, Congress, by failing to cover commerce with the Indian Tribes as such, plainly did not exclude from coverage all activities which affect interstate commerce but which happen to involve Indians. We assume, for example, that even the Navajo Tribe would not argue that General Motors Corporation or United States Steel would be exempt from the Act if they were owned by Indians. Yet that would be the unavoidable consequence of holding that any activity which constitutes "commerce with the Indian Tribes" is not covered by the Act.

The Tribe has apparently now recognized the difficulties inherent in this argument, for it has not even mentioned it in its Petition for Certiorari. Rather, the Tribe now argues

---

[1] Since "Commerce with the Indian Tribes" includes any commerce with individual Indians, *e.g.*, *United States* v. *Holliday*, 3 Wall. 409 (1866); *United States* v. *43 Gallons of Whiskey*, 93 U.S. 188 (1876), it may or may not simultaneously constitute "commerce among the several states."

in this Court that the lower courts' "literal" interpretation of the Act should be reversed for the following reasons:

1. The Navajos are too "illiterate, poorly educated, unable to speak English with facility," to exercise the rights guaranteed to employees by the Act.

2. To apply the Act to the Navajos would be to abrogate the Treaty of 1868 between the United States and the Tribe.

3. Under *Elk* v. *Wilkins*, 112 U. S. 94, 99-100 (1884), "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."

We will briefly examine each of these arguments, in order to demonstrate that none of them presents any substantial questions of the kind which would justify review by this Court on certiorari.

1. The assertion that the Navajos are not sufficiently educated, literate, or otherwise equipped to exercise their rights as employees is obviously irrelevant to this case. In the first place, the Tribe does not argue that Indians are not "employees" within the meaning of the Act, but that an enterprise on an Indian Reservation—whether it employs only Indians, only non-Indians, or a combination of both—is not subject to the Act. If the Navajos are correct, Texas-Zinc would be exempt from the Act even if it employed no Indians at all.

Moreover, the question here is not whether the Board should exercise jurisdiction, but whether it has the power to do so. However, lest the Court get the impression that the United Steelworkers, or any other party to this litigation, seeks to take advantage of this already much-abused segment of our population, we would like to point out that the Navajos are not so isolated from the twentieth century as their counsel would have us believe. The record contains the affidavit of Arthur Mullett, a United Steelworkers' representative with many years of close contact with union affairs

in and around the Navajo Reservation. This affidavit shows that Navajo employees, both on and off the Reservation, have been members of labor unions and have enjoyed the benefits of collective bargaining. (J.A. 76-79). It states that all the Indian employees of the Texas-Zinc are required to know English, and it points out that many of the Indians living on the Reservation are veterans and have received the benefits of an education under the G.I. Bill.

It is probably true that the average level of education among the Navajos is below that of the nation as a whole. On the other hand, the less educated Indians are not likely to be the ones who take jobs in a complex uranium mill. All in all, we find it hard to believe that Navajos who have the ability to perform industrial work, and who vote for their own Tribal Council and for Congressmen, Senators, and Presidents, are too ignorant and uneducated to be able to exercise wisely the rights of self-organization which are guaranteed to all other industrial employees in the country.

2. The Treaty of 1868 between the Navajo Tribe and the federal Government, upon which the tribe heavily relies, also has very little bearing on the issue in this case. That treaty in no way guarantees to the Navajos an exemption from general federal law. Indeed, the very portion of the Treaty which the Tribe cites contemplates that "officers, soldiers, agents, and employees of the government" would enter the Reservation "in discharge of duties imposed by law." Thus, while the Treaty plainly conferred upon the Tribe broad powers of self-government, it did not—and probably could not—modify the Constitutional power of the federal government to enact general regulatory legislation which supersedes all contrary laws of any lesser governmental entity, be it a state, municipality, or Indian Tribe.

The Tribe is therefore forced to cast its argument very narrowly. The National Labor Relations Act should not be applied on the Reservation, it argues, because so to apply

it would "conflict with the Navajo Tribe's right to exclude outsiders under its Treaty . . ." (Pet. for Cert. 10)

The first difficulty with this argument is that the Navajos' right to exclude "outsiders" — by which it presumably means union organizers — is not directly in issue in this case. The Tribe simply assumes that if the Act is applicable on the Reservation, all Tribe rules excluding union organizers would be superseded. But the sole issue in this case is whether the NLRB has authority to conduct an election on the Reservation, and as we have seen, the Treaty expressly authorizes government officials to enter the Reservation in discharge of their duties.

But let us assume, with the Tribe, that one consequence of applying the Act in this case would be to preclude the Tribe from excluding union organizers from the Reservation. The Tribe concedes that Congress has the power to modify the Treaty by legislation, but it argues that such an unworthy intention should not be attributed to Congress in this case. If the effect of the Act were to wipe out the Treaty entirely, the argument might have some force. But the Act affects at most just one small provision of the Treaty —and only to a very limited extent. We frankly doubt that even the Tribe would sincerely consider this a significant breach of faith, despite the eloquence with which counsel expresses a sense of outrage.

Moreover, the Tribe has in effect consented to this modification of its Treaty by permitting Texas-Zinc to come on the Reservation. The Tribe is free, if it chooses, to exclude all industry, but if it wishes to become part of the national economy it can hardly complain if the laws regulating that economy are then made applicable on the Reservation.

The Navajo Tribe cannot have it both ways. It can, perhaps, keep the reservation as the agricultural society without industry it was in 1868. It can avoid the problems involved in employment relationships by preventing employment. But it cannot simultaneously waive its power to ex-

clude industry, invite it on to the Reservation, and at the same time prevent the laws which the government of the United States has established to deal with industry and industrial relations from applying on the Reservation.

But in the last analysis, the answer to the Tribe's argument based on the Treaty, as well as its argument based on the alleged "backwardness" of the Navajo people, is that the Act either applies to all Indian Reservations or to none of them. Even the Navajos do not contend that they alone are exempt. Thus, any argument which is based on factors applicable to the Navajo Tribe alone is inherently unpersuasive. The issue in this case must be resolved by examining the statute itself.

3. The Tribe ultimately falls back on the dictum in *Elk* v. *Wilkins*, 112 U.S. 94, 99-100 (1884) that general acts of Congress apply to Indians only when "so expressed as to clearly manifest an intention to include them."

But this principle, whatever its vitality may be, has certainly not precluded the application of general acts of Congress to Indians even though "Indians" are usually not specifically mentioned in such acts. E.g., *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418 (1935) (Income Tax Laws); *Ex Parte Greene*, 123 F. 2d 862 (2d Cir, 1941), *cert. denied*, 316 U.S. 668 (1942) (Selective Service Laws). See also *Arizona ex rel. Arizona State Board* v. *Hobby*, 221 F. 2d 498 (D.C. Cir. 1954) (Social Security Act). And while every statute must be analyzed on the basis of its own language and its own underlying purposes, the presumption that general legislation does not apply to Indians has in more recent years been replaced by the presumption stated by this Court only last year: "that general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary . . ." *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120.

Moreover, there can be no question that the National

Labor Relations Act, when read in the light of its underlying objectives, manifests an intention to cover any enterprise which "affects" commerce, whether or not located on an Indian Reservation. "It is the effect upon commerce, not the source of the injury, which is the criterion," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32 (1937).

Section 1 of the Act, 29 U.S.C. § 151, spells out its basic purposes. This section begins with a statement of the legislative finding that interstate commerce is often impaired when employees are denied the right to organize and to bargain collectively, since the denial of these rights tends to "lead to strikes and other forms of industrial strife or unrest." It further states that the "inequality of bargaining power" between employees who do not have the freedom to organize, and employers who are often very large and highly organized, also tends to burden commerce by "depressing wage rates and the purchasing power of wage earners" and by "preventing the stabilization of competitive wage rates and working conditions within and between industries." The section then goes on to say that the free flow of commerce can be promoted by providing legal protection of "the right of employees to organize and bargain collectively," since this encourages "the friendly adjustment of industrial disputes." It also states that certain practices of labor organizations, which burden or impair commerce, should be eliminated.

The final paragraph of Section 1 reads as follows:

> "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

In the light of this statement of objectives, how can the Act possibly be read as intending to exclude from its coverage industries which affect interstate commerce simply because they happen to be located on an Indian reservation? Would not the obstruction of the free flow of interstate commerce be as great if it arose as a result of industrial strife caused by the denial by an employer on a reservation of his employees' right to organize? Would not the resulting inequality of bargaining power be just as great? Is there anything in the final paragraph from which one could conclude that "the policy of the United States" there set out was not intended to apply to commerce across state lines arising on an Indian reservation? The answers to these questions, in our view, are self-evident.

Indeed, whatever doubt may possibly have been entertained on this score would certainly have been dissipated by the 1959 amendments to the Act. Appellant argues that the Navajos are not culturally ready for unions. Are they culturally ready for "blackmail" picketing and secondary boycotts? Or, to put the question in a more relevant fashion, did Congress give any indication when it passed the National Labor Relations Act in 1935, the Taft-Hartley amendments in 1947, or the Landrum-Griffin amendments in 1959, that the protections for workers, employers and the national commerce which it provided should be inapplicable where Indians were involved?

The answer plainly is that Congress at no time indicated, in any fashion, that its objectives were so limited. The Navajo labor relations policy, which the Tribe would put into effect on the Reservation in place of the federal law, illustrates the extent to which the purposes of the Act would be thwarted if the Tribe's position were upheld. The Tribal resolutions (J.A. 27, 28) would deny to employees on the Reservation precisely those rights which Congress intended to protect: the right to organize, the right to bargain collectively through freely chosen representatives, and

the right to strike and engage in other concerted activities. It would deny these rights to employees whether or not they are Indians. Apparently it is the judgment of the Navajo Tribe that the denial, rather than the protection, of these rights is the way to promote prosperity and industrial peace in industries located on the Reservation and that in this way the nation will best be assured that it will receive the uranium concentrate produced on the Reservation. But Congress has made a different judgment. It seems to us that there is no possible basis for arguing that its judgment does not apply because the uranium originates on an Indian Reservation.

The issue which the Tribe raises in this case is not new. It was settled by the Board nearly nine years ago, after consultation with the Secretary of the Interior, who has the primary responsibility for administering Indian affairs on behalf of the Government. In 1952, a union sought an election among the employees of Simplot Fertilizer Company, located on the Fort Hall Indian Reservation. The Board held, over the employer's objection, that it had jurisdiction. *J. R. Simplot Co.,* 100 N.L.R.B. 771 (1952). The Tribal authorities refused to grant the Board permission to hold the election, and the Board then inquired of the Secretary whether there was any reason in law or in policy to refrain from enforcing the Act on the Reservation.

The Secretary, after reviewing the relevant precedents, concluded that "the fact that the employer's activities are conducted on the Fort Hall Indian Reservation appears to be without legal significance so far as the scope of the Board's jurisdiction in this matter is concerned." (J.A. 55) The Secretary also stated that there was no policy reason for the Board, in its discretion, to refrain from enforcing the Act on the Reservation. "It is our view," he said, "that Indians should be able to enter into industry on a non-discriminatory basis and that having entered into industry they

should share its burdens and its benefits in the same measure as do non-Indians." (J.A. 55).

We invite the Court's attention to the full text of this exchange of correspondence, which appears at pages 48-57 of the Joint Appendix. It shows that the questions raised by the Navajo Tribe in their Petition have been fully and adequately considered and disposed of by those agencies of the Government having primary responsibility in the areas of labor relations and Indian affairs. The courts below, after reviewing the issues *de novo*, have found as a legal matter that the 1952 rulings were correct. There is no need for further review in this Court.

CONCLUSION

For the reasons above stated, the Petition for Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1960

THE NAVAJO TRIBE, A TREATY TRIBE OF INDIANS, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 872

THE NAVAJO TRIBE, A TREATY TRIBE OF INDIANS, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the district court is not officially reported (R. 108–111).[1] The opinion of the court of appeals (Pet. A1–A7) has not yet been reported. The Board's Decision and Direction of Election (R. 37–46) are reported at 126 NLRB 603.

JURISDICTION

The judgment of the district court was entered on May 10, 1960 (R. 107). The judgment of the court of appeals was entered on March 2, 1961 (Pet. A8).

[1] "R." refers to the Joint Appendix in the court of appeals.

The petition for a writ of certiorari was filed on April 4, 1961. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board has jurisdiction to conduct a representation election among the employees of a company shipping material in interstate commerce, notwithstanding that the company's plant is located on an Indian reservation.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are set forth in the petition (Pet. A9–A12) and in the appendix, *infra*, pp. 12–13.

STATEMENT

A. *The Board's Decision and Direction of Election.*—The Texas-Zinc Minerals Corporation, hereafter called the Company, operates a uranium concentrate mill at Mexican Hat, Utah, which is located within the Navajo Reservation (R. 108; 5, 8, 38). Annual shipments substantially in excess of $5,000,000 in value are made from the Company's plant to the Atomic Energy Commission's receiving station in Colorado (R. 108; 14, 38, 68–69). The operation is carried on under the terms of a 25-year lease with the Navajo Tribe, executed in 1956 (R. 108; 13, 32–35). The Company employs about 87 persons, of whom 47 are members of the Tribe and 40 are non-Indians (R. 108; 14, 100, 108).

On May 12, 1959, the United Steelworkers of America, AFL–CIO, filed a petition with the Board

under Section 9(c) of the Act requesting that an election be held to determine whether the Company's employees wished to be represented by it for purposes of collective bargaining (R. 108; 5, 38). A hearing was thereafter conducted in which the Navajo Tribe intervened specially for the purpose of contesting the jurisdiction of the Board to apply the Act to operations on the Navajo Reservation (R. 108–109; 6, 39). The Steelworkers and the Company also participated in the hearings, and two other unions, International Union of Operating Engineers, AFL–CIO, and International Hod Carriers, Building and Common Laborers Union of America, intervened for the purpose of having their names included on the ballot in the election (R. 109; 5–6, 39).

The Tribe contended in the hearing before the Board that it enjoys powers of self-government under its Treaty of 1868 with the United States, including the power to regulate labor-management relations within its reservation, and that this authority was not affected by the passage of the National Labor Relations Act (R. 6, 37). Pursuant to its asserted authority to legislate within tribal lands in the field of labor-management relations, the Tribal Council of the Navajos had adopted resolutions in August, 1958, which prohibited solicitation for union membership and "any other incidents or adjuncts of unionization activities on the Navajo Reservation" (R. 12, 22–28). The resolutions had further provided that violations by Indians may be punished by sentence to hard labor, and that non-Indians who engage in union activity may be excluded from the reservation (*ibid.*). The

power of exclusion of non-Indians from the reservation was asserted to derive specifically from the Treaty of June 1, 1868, between the Navajo Tribe and the United States, 15 Stat. 668, which in applicable part provides (R. 7):

> * * * the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

The Tribe contended before the Board that it was authorized by the Treaty of 1868 and its own resolutions of August, 1958, to exclude "any and all representatives of the United Steelworkers of America," and in effect to prevent the Board's representation proceeding from being conducted (R. 6–7).

Following the hearing, the Board, on February 11, 1960, issued its Decision and Direction of Election (R. 109; 37). The Board (two members dissenting) held that the Act vested it with jurisdiction over "commercial enterprises operating on an Indian reservation," and that there were no valid policy considerations which militated against the exercise of that jurisdiction here (R. 109; 43). Accordingly, the Board directed an election among the company's employees to determine whether they desired one of the competing unions, or none, as their bargaining representative (R. 44–46).

B. *The Decisions of the District Court and Court of Appeals.*—On March 23, 1960, the Tribe brought this suit in the district court, contesting the validity of the Board's decision, and seeking a preliminary injunction against the holding of the election. The Company moved to intervene as plaintiff and also applied for an injunction against the holding of the election (R. 29). The complaint asserted that the Board lacked jurisdiction in the representation proceeding because the National Labor Relations Act was not intended to apply to interstate activities of business enterprises located on Navajo tribal lands (R. 15–16). The complaint further alleged that full authority respecting labor-management relations on the reservation was vested by law in the Tribal Council, governing body for the Navajo Tribe, and that the Board's administration of the Act on tribal lands was contrary to the policies adopted by the Tribal Council (R. 9, 18). The Board and the unions moved to dismiss the complaint for failure to state a claim warranting relief, or, in the alternative, for summary judgment in their favor (R. 30–31, 75, 103).

On May 10, 1960, following hearing, the district court denied the motions for preliminary injunction and dismissed the complaint (R. 107, 111). The court concluded that the operations of the Company's plant located on the Navajo Reservation affected commerce within the meaning of the National Labor Relations Act; that the Board was accordingly authorized to entertain the petition of the United Steelworkers for a representation election; and that the Tribe's complaint

therefore failed to state a claim warranting relief (R. 108–111).

The court of appeals affirmed the conclusions of the district court and held that the Board had jurisdiction to direct the representation election (Pet. A1–A7). The court held that the National Labor Relations Act clearly applied to the Company's interstate operations, and that a different conclusion was not required by the circumstance that its plant was located on the Navajo Reservation, for Congress, in passing the Act, superseded "the local policies of the States and the Indian tribes, in all cases to which the * * * Act applies" (Pet. A6).[2]

ARGUMENT

1. Petitioners recognize (Pet. 9) that Congress has the power to encompass interstate business located on Indian reservations within the scope of the National Labor Relations Act, even though this may entail the modification or abrogation of earlier treaties. See *The Cherokee Tobacco*, 11 Wall. 616, 621; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641, 656–657. The basic question therefore is whether Congress intended this result. Petitioners contend (Pet. 9–10) that, since the Act does not specifically refer to Indian reservations, it cannot be assumed that Congress intended to cover labor disputes involving interstate businesses on such premises. This contention is erroneous, for there is strong evidence

[2] The Tribe thereafter applied for a stay of the election, pending the filing of this petition for certiorari, which was denied by the court of appeals. On April 6, 1961, Chief Justice Warren denied a further request for a stay.

demonstrating that the Act was designed to cover those disputes no less than other disputes affecting commerce.

In enacting the National Labor Relations Act, Congress intended "to regulate labor relations to the full extent of its constitutional power under the Commerce Clause * * *." *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 391; see *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, 607. Moreover, "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally," but "went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal [the National Labor Relations Board] * * *." For it "considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid [those] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union,* 346 U.S. 485, 490.

The foregoing is manifest from the Act itself. Section 1 declares it "to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" (Appendix, *infra,* p. 13). Sections 9(c)(1) and

10(a) confer upon the National Labor Relations Board jurisdiction over all representation questions and unfair labor practices "affecting commerce"[3] (Pet. A11, A12). Section 10(a) adds that the Board's power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *." And, finally, the definitions of "employer" and "employee" in Section 2 are broad, and provide no exception for Indians or businesses on Indian lands (Pet. A9–A11).

This comprehensive regulatory scheme makes it apparent that Congress could not have intended to exempt a business like the Company's—which annually ships in interstate commerce materials valued in excess of $5,000,000 (see *supra*, p. 2)—from the regulatory provisions of the Act merely because it happened to be located on an Indian reservation. Labor troubles at such an operation could, by obstructing the free flow of goods across state lines, imperil industries vital to the national economy no less than if the operations were located on non-Indian territory. Moreover, to leave an Indian tribe free to apply its own labor laws to a business simply because it was located on Indian territory would nullify a uniform national labor policy no less than when a state or

[3] Section 2(7) defines the term "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Pet. A11).

other local authority purports to do so. See *Garner* v. *Teamsters Union, supra; Hill* v. *Florida,* 325 U.S. 538; *Automobile Workers* v. *O'Brien,* 339 U.S. 454.

Accordingly, the lower courts properly construed the Act as applying to interstate operations on an Indian reservation, even though it does not specifically mention such reservations.

2. The ruling of the courts below that Congress intended to include Indian lands within the National Labor Relations Act is strongly supported by the decision of this Court in *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99. That case held that the provisions of the Federal Power Act, authorizing the taking of property for hydroelectric development upon payment of just compensation, were applicable to Indian lands, notwithstanding that the statute did not specifically refer to such lands. The Court, in rejecting the Tuscarora Nation's reliance on *Elk* v. *Wilkins,* 112 U.S. 94 (see Pet. 9), stated that "it is now well settled * * * that a general statute in terms applying to all persons includes Indians and their property interests" (362 U.S. at 116). The Court then went on to conclude that the Tuscarora property was included, relying upon the "complete and comprehensive" character of the provisions of the Federal Power Act, the fact that the statute "gives every indication that * * * Congress intended to include lands owned or occupied by any person or persons," and finally upon the absence of any provision to "exclude lands or property owned by Indians" (*id.* at 118). As we have shown, the same

considerations are equally applicable here.[4] See also *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418, 419–420; *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 607; *Ex parte Green*, 123 F. 2d 862 (C.A. 2).[5]

3. Petitioner's suggestion (Pet. 11), that application of the Act to the Company's employees might "disrupt the tribal life of an untutored and dependent people," is addressed to the wrong forum.[6] Questions as to the wisdom and desirability of the Act's coverage are for Congress. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 568. In any event, when the Board was initially confronted with the question of whether to enforce the provisions of the Act, with respect to a commercial enterprise located on an Indian reservation in *Simplot Fertilizer Company*, 100 NLRB 771, 107

[4] Nor can the *Tuscarora* case be distinguished, as petitioners attempt to do (Pet. 10), by relying on the reference to "Indian reservations" in Section 3(2) of the Federal Power Act, which defines the term "reservations" for purposes of that statute. The Court found that this provision was not relevant to the question presented because it interpreted Section 3(2) as embracing only " 'lands and interests in lands owned by the United States' " (362 U.S. at 111).

[5] *Williams* v. *Lee*, 358 U.S. 217 (see Pet. 11), is distinguishable. The Court there held that the state court lacked jurisdiction over a civil suit involving Navajo Indians, since their treaty vested the tribal court on the reservation with jurisdiction over such matters. However, unlike here and in *Tuscarora*, the basis for the civil action was not a broad and comprehensive federal law which could be deemed to have superseded the tribal treaty (*id.* at 222).

[6] See, however, the affidavit contained in the record (R. 76–78) which describes the extent to which the Navajo Indians, both on and off the reservation, have already taken roles in modern industry and have participated in the collective bargaining process.

NLRB 1211, the Board requested the advice of the Secretary of the Interior, in his supervisory capacity respecting the Indian tribes (R. 48–51). The Secretary replied (R. 55):

> * * * we do not believe that merely because Indians, as well as non-Indians, are employed in the enterprise involved, there should be distinction made between this case and any other case handled by the National Labor Relations Board. It is our view that Indians should be able to enter into industry on a non-discriminatory basis and that having entered into industry they should share its burdens and its benefits in the same measure as do non-Indians.

As the Board concluded in its decision in the representation case, there is "no Federal policy * * * with which an exercise of jurisdiction herein would be at variance" (R. 43).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY, 1961.

APPENDIX

Section 1 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151) is as follows:

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bar-

gain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 872

THE NAVAJO TRIBE, a Treaty Tribe of Indians, *et al.*, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY MEMORANDUM

In considering the apparent conflict between the provisions of the Navajo Tribe's treaty with the United States and those of the National Labor Relations Act, as amended—and petitioners have stated frankly that this is not a question of Congressional power but rather one of construction (Pet. 9)—two important datum points, ignored alike by the Labor Board and by the Steelworkers, must be borne in mind.

First. The National Labor Relations Act, insofar as here material, was last amended in 1947. See 29 U.S.C. § 151, set forth at Labor Board Br. Op. 12-13.

Nearly three years later, on April 19, 1950, Congress passed a comprehensive act "In order to further the purposes of existing treaties with the Navajo Indians * * *." Sec. 1 of the Navajo and Hopi Rehabilitation Act, c. 92, 64 Stat. 44, 25 U.S.C. § 631. This Act was amended as late as August 23, 1958 by Public Law 85-740, 72 Stat. 834, to grant still further assistance to the tribes concerned.

We do not for a moment contend that this recognition of the existing obligations of the treaty with the Navajo Tribe amounted to a legislative limitation of the National Labor Relations Act. We do urge that the apparent conflict between the specific terms of a treaty recognized as being in force as late as 1958 and the general terms of general legislation last amended in its relevant impact here in 1947 does call for an application of rules of construction formulated by this Court over many years (Pet. 9-11), rules that were all too plainly disregarded by the court below.

Second. Since the Navajo Tribe relies upon its own Treaty, neither decisions by the Labor Board nor expressions by the Secretary of the Interior in respect of the Fort Hall or any other Indians (*J. R. Simplot Co.* 100 N.L.R.B. 771, 107 N.L.R.B. 1211; see Steelworkers Br. Op. 9-10, Labor Board Br. Op. 10-11) are relevant—unless similar treaty provisions are involved, which is not even remotely the case.

We do not think that the circumstance that this case is limited to the terms of the Navajo Treaty lessens its public importance for purposes of review. Cf

Williams v. *Lee*, 358 U.S. 217 (Navajo Treaty involved).

For the Navajo Tribe numbers around 85,000 persons, and its reservation extends over parts of three States, comprising an area approximately as large as West Virginia. The Navajo Tribe is now the largest Indian tribe in the country, and its reservation is similarly the largest Indian reservation now in the United States.

We submit, therefore, that resolution of the question presented by the petition may fairly be said to call for an authoritative decision by this Court.

Respectfully submitted.

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MAY 1961.